**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

**R.S.A.No.1969 OF 2004**

**DATE OF DECISION: 21.07.2006**

**Mahabir Singh**

**...Appellant**

**VERSUS**

**Smt.Kalawati and Others**

**...Respondents**

**CORAM: HON'BLE MR. JUSTICE MAHESH GROVER**

**PRESENT**: Mr.B.R.Mahajan, Advocate
for the appellant.
Mr.M.S.Bedi, Advocate,
for respondent No.1.
Mr.Ashok Arora, Advocate,
for respondent No.3.

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**MAHESH GROVER, J.**

This Regular Second Appeal has been filed by the defendant-appellant against the judgment and decree dated 19.01.2004 passed by the learned lower appellate Court.

Smt.Kalawati, plaintiff-respondent No.1 has filed a suit for declaration to the effect that she is owner in possession of 1/4$^{th}$ share of the land which has been detailed in the plaint and that she is entitled to get her name recorded as owner of her share of the property. A prayer for perpetual injunction was made to restrain the appellant from transferring the land in any manner. Mam Chand, was owner of the property who died in the year, 1972 leaving behind two sons namely Hari Singh and Jagar and two daughters namely Badamo and Chawli. The second daughter namely Chawli died in the year, 1947. Jagar Singh also died and his estate was

inherited by his daughter. Badamo suffered a collusive decree in the year, 1985 in favour of sons of Hari Singh. It is the case of the appellant that the mutation regarding the estate of Mam Chand was entered on 17.11.1973. The present respondent is the daughter of Chawli who has laid her claim to the extent of 1/4th share of the property as she was entitled to the same on the basis of succession. The appellant denied that Chawli was the daughter of Mam Chand and further claimed that the claim was being made after a period of 21 years and that they had become owners by way of adverse possession. A specific plea in para No.6 of the written statement was made that they have become owners by adverse possession. The trial Court decreed the suit of the respondents and appeal filed by the defendants/appellants was dismissed by the learned lower appellate Court. This has resulted in the present appeal.

Sh.B.R.Mahajan, learned counsel for the appellant has contended that the judgment of the learned lower appellate Court is liable to be set aside inasmuch as the observations of the learned lower appellate Court are contrary to the record. Specific attention was drawn to para No.15 of the judgment which is as follows:-

> "There is no denial of the fact that mutation decided on 17.11.93 was not challenged prior to filing of the present suit and the present suit was filed on 10.06.94 and as such, it is the admitted case of the parties that mutation sanctioned on 17.11.93 could only be challenged in the year 1994 but the present suit is on the basis of inheritance and the defendants have not taken the plea of adverse possession and in these circumstances, the suit cannot be termed to be time barred as suit on the basis of inheritance can be filed at any point of time. However, the defendants in that suit may take the plea of adverse

> possession and the suit on the basis of inheritance can be defeated if the defendants are successful in establishing their plea of adverse possession. In the present case, no plea of adverse possession has been taken, rather the stand of the defendants is that the plaintiff is not related to deceased Mam Chand in any manner and as such, the suit on the basis of inheritance cannot be termed to be time barred".

It was contended that the details of the mutation which were referred to have been wrongly mentioned as 17.11.1993 whereas the records state to the contrary and that the mutation has actually been sanctioned on 17.11.1973. Apart from that, it has been wrongly noticed by the learned lower appellate Court that the plea of adverse possession was not raised by the appellant. He has placed on record the copy of the written statement to substantiate this plea. The next contention made by the learned counsel for the appellant was that the challenge was made after a period of 21 years and in these years, the appellant was in open and hostile possession of the property to the knowledge of the respondent and, therefore, he become owner by adverse possession.

Mr.Bedi, learned counsel for respondent No.1 has contended that it was established on record that Chawli was the daughter of Mam Chand who died in the year, 1947 and, therefore, there was no dispute regarding the relationship of the respondent being the successor-in-interest of Mam Chand, and, therefore, she was entitled to succeed his estate to the extent of 1/4$^{th}$ of her share. It is also contended that the respondent had in fact given this land on Batai to the appellant and she had been receiving rent up to 1993 and now she wanted her share. It was also contended that these findings of fact cannot be interfered with.

I have heard learned counsel for the parties and also perused the record as well.

There is no dispute that the learned lower appellate Court had proceeded on wrong facts. The mutation of the land, in question, was sanctioned on 17.11.1973 but the learned lower appellate Court proceed on the assumption that it was on 17.11.1993. The finding of the learned lower appellate Court on this ground is apparently erroneous. Perusal of the Exhibit P2 shows that the mutation was sanctioned in the year, 1973. The learned lower appellate Court has gone wrong in holding that no plea of adverse possession was taken by the appellants. In para 6 of the written statement, there is categoric averment to that effect which is as follows:-

> "Actually the defendants No.3 and 4 are cultivating specific numbers of the suit land at the spot and they are cultivating the suit land peacefully continuously and openly. Possession of the answering defendant is hostile from death of Mam Chand, therefore, on the basis of adverse possession, the answering defendants Nos.3 and 4 have become the owner in possession of the suit land".

Be that as it may, the question, however, remains as to whether the respondent was entitled to her 1/4$^{th}$ share in the suit property. It has been established by way of evidence that the respondent was the daughter of Chawli who is daughter of Mam Chand. DW6-Ompati who is daughter of Jagar has testified this fact that the respondent was the daughter of Chawli, who was daughter of Mam Chand. There is, thus, no dispute with the fact that the respondent was the successor-in-interest of Mam Chand. The same witness has also testified that the land in dispute was given on Batai to the appellant. In fact the Batai was being received by the respondent from Ompati and Mahabir who are defendants No.3 and 4.

In view of this overwhelming evidence, plea of the appellant regarding adverse possession faits. The respondent was very much alive to her rights and the possession of the appellants cannot be termed to be hostile.

Learned counsel for the respondent has cited a judgment of Hon'ble Supreme Court reported as **Gurdev Kaur and Others Vs. Kaki and Others, 2006 (2), RCR (Civil), 561,** in support of his contention that even if the finding of fact recorded by the learned lower appellate Court was wrong even then in regular second appeal, the findings of the fact could not be interfered. There is no dispute regarding this proposition of law. The appellate Court no doubt proceeded on wrong facts but it does not affect the ultimate conclusion as the appellant has failed to prove his adverse possession. This plea cannot be raised to defeat the claim of the owner who is alive to her possession. Even otherwise, the appellant cannot defeat the rights of the respondent who is entitled to succeed to the share of Mam Chand regarding 1/4$^{th}$ of her share.

In view of this, there is no reason to differ with the finding of the learned lower appellate Court. No interference is warranted in the Regular Second Appeal which is accordingly dismissed.

July 21, 2006 (MAHESH GROVER)
seema JUDGE